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No. 83745-7

SUPREME COURT OF THE STATE OF WASHINGTON

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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

ZDI Gaming, Inc.,

Respondent,

v.

THE STATE OF WASHINGTON, by and through the
Washington State Gambling Commission,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Washington State Gambling Commission (Commission) improperly denied ZDI Gaming, Inc. (ZDI) permission to upgrade its approved VIP electronic pull-tab machine. The superior court overruled the Commission's order, reasoning that the VIP cash card upgrade satisfies the definition of "cash" as a "cash equivalent" consistent with the regulatory requirements. The Court of Appeals agreed, holding that the Commission's denial is not supported by substantial evidence. The decisions of both reviewing courts are fully consistent with Washington law.

A. IDENTITY OF ANSWERING PARTY

ZDI Gaming, Inc., the prevailing respondent before the Court of Appeals, asks this Court to deny the Commission's petition for review.

B. COURT OF APPEALS DECISION

In its published opinion, Division Two of the Court of Appeals (JJ. Quinn-Brintnall, Van Deren, and Penoyar) denied the Commission's appeal of the Thurston County Superior Court's decision and remanded to the superior court for reconsideration of ZDI's attorney fees and costs.

C. ISSUES PRESENTED

Whether this Court should grant review where the petitioner presents no valid grounds for review under RAP 13.4(b) and where the

Court of Appeals correctly resolved the issues before it in accordance with RCW 9.46.095 and controlling caselaw.

D. STATEMENT OF THE CASE

“Faux” slot machine are prevalent in Washington and have been since the Legislature repealed the constitutional ban and established the Gambling Commission, the Horse Racing Commission, and the Lottery Commission to approve gambling activities for people to enjoy legal gambling. RCW 9.46, 67.16, and 67.70, Op. 4, CP 535, 539-540, 1027 AR 786,

In 2005, ZDI figured it would better serve its restaurant, tavern, non-profit, and charity customers if patrons could buy its paper pull tabs with a cash card. Op. 5, AR 742. Fewer people were carrying money; cash cards were popular and were being used in the gambling industry. CP 1029. “Faux” slot machines approved by the Gambling Commission had been in operation statewide for more than ten years. Op. 2, CP 1027. The version ZDI had on the market was called the VIP. Op. 4. ZDI added a cash card feature to its approved VIP. Id. The Gambling Commission would not approve the upgrade if the cash card recorded prizes of twenty dollars or less, but it did approve a ZDI VIP upgrade that allows the customer to purchase the pull tab with a cash card and activate the slot machine features. Op. 5, Gerow Dec. Opposing Motion to Stay, Ex B Case No. 36751-3-II.

This case concerns the ability to use the cash card feature to both purchase the pull tab and record the prize automatically at the approved dispenser. Op. 1. The outcome depended, in part, on whether cash cards were “cash” under the agency rule requiring cash prizes. Id. The term “cash” was not defined in rule or statute. Op. 16. Cash equivalents such as checks, chips, and vouchers were acceptable. Op. 15. Thurston County superior court and the Court of Appeals concluded cash cards are cash equivalents, meeting the definition of “cash.” Op. 7 and 17. Further analysis of the meaning of “cash” is not required from this court. Thurston County heard this matter as requested by the Commission. Review should be denied.

E. REASONS REVIEW SHOULD BE DENIED

The Commission’s three issues for review do not meet the criteria for acceptance of review under RAP 13.4(b):

1. APA Appeals May Be Heard In Any Superior Court

The Court of Appeals recognizes the Legislature’s power to conditionally waive sovereign immunity under Article II, section 26 of the Washington Constitution when it endorses the Gambling Act provision, RCW 9.46.095, that authorizes suits, under the Administrative Procedures Act (APA) outside Thurston County. The Legislature’s power under Article II, section 26 of the Washington Constitution to approve gambling

activities remains unaffected. The Legislature consents to APA review statewide, not just in Olympia.

Consistent with its constitutional powers, the Legislature authorized APA suits against the Commission in superior court venues across the state. RCW 9.46.095 and RCW 34.05.514. The Commission conducts business statewide; thus, access to justice has never been restricted to Thurston County. The Thurston County "jurisdiction" provision of the Gambling Act specifies APA cases may be reviewed statewide. RCW 9.46.095. The Commission omits reference to the APA exception in RCW 9.46.095. This is the exception the Court of Appeals applied in this case.

Contrary to the Commission's argument, the Court of Appeals did not find the statutory term "jurisdiction" ambiguous. Instead, the court described the nature of the term "jurisdiction." Use of the term "jurisdiction" is like using the term "clothes." Pants, shirts, shoes, and socks are all clothes, but they serve very different purposes. Similarly, there are different kinds of "jurisdiction." Subject matter jurisdiction is one. Venue is another. The opinion explains the differences between venue and subject matter jurisdiction. The critical issue with venue is "location," while the critical issue with subject matter jurisdiction is "the type of controversy." Op. 9. Statutes requiring suit in a specific location are venue statutes. *Dougherty v. Dep't of Labor & In.*, 150 Wn.2d 310,

315, 76 P.3d 1183 (2003); *Shoop v. Kittitas County*, 149 Wn.2d 29, 65 P.3d 1194 (2003).

The Legislature rarely uses the term “venue” when specifying the location for filing an action. RCW 4.12. The Legislature uses the term “jurisdiction” to mean venue. Op. 12 citing *Myusovich v. State*, 59 Wyo. 406, 141 P.2d 540 (1943) and *Bailiff v. Storm Drilling Co.*, 356 F.Supp. 309, 311 (E.D. Tex. 1972). The Legislature specified jurisdiction, rather than subject matter jurisdiction, which indicates the statute encompasses venue. Use of the term jurisdiction correctly includes venue.

This case is an APA case, which is not the kind of case that the Legislature restricted to Thurston County. RCW 9.46.095. Thus, the decision does not raise constitutional issues as suggested in the petition.

The Legislature waived state sovereign immunity in the 1960’s. RCW 4.92.090. Since then, any person or corporation having a claim against the Commission has had the right to file in any superior court. RCW 4.92.010. This right includes the right to file a petition for review under the APA in superior court in any venue, even against the Commission. RCW 34.05.514 and RCW 9.46.095.

The Commission licenses gambling equipment. RCW 9.46.310, WAC 230-06-050, 230-14-047. Without approval, the equipment may not be used. *Id.* There is no state ban on slot machines; slot machines approved by the Gambling Commission or Lottery Commission are legal. RCW 9.46.215(2) and RCW 67.70.040(1)(a), 67.70.140 and 67.70.210.

An agency-required approval or authorization of equipment is a licensing action under the APA. RCW 34.05.010(9). The APA defines a “license” as an approval or similar form of authorization required by law. *Id.*

As required, ZDI asked the Commission to approve its updated paper pull-tab dispenser. When denied a license for the upgrade, ZDI filed a petition for declaratory relief under the APA. WAC 230-06-050, 230-17-180, and RCW 34.05.240. The petition was properly filed as an APA case in Pierce County, where its business and the equipment was located. RCW 34.05.514 and RCW 9.46.095. RCW 9.46.095 exempts APA cases from the Thurston County filing requirement. Thus, “jurisdiction” in Thurston County was not implicated.

Case authority from the 1930’s is not conflicting, as RCW 9.46.095 had not yet been adopted. More recent decisions, such as *Lathrop v. State Energy Facility Siting Evaluation Council*, 130 Wn. App. 147, 121 P.3d 774 (2005), do not conflict with the decision either. As in *Lathrop*, the court follows the Legislature’s directive regarding location of filing. In *Lathrop*, the statute at issue restricted certain APA cases to Thurston County. With the Commission, the reverse is the case; certain APA cases may be pursued in venues outside Thurston County. The denial of ZDI’s license to upgrade its approved pull-tab dispenser was the specific kind of APA case that may be heard outside Thurston County.

Notably, Pierce County never heard the petition for review. Venue was transferred to Thurston County where the matter was heard. The

Commission has no grounds to support a constitutional argument because the proceeding was in Thurston County, precisely where it wanted it to be. Nothing in the decision prevents the Commission from achieving the same result in any other case it wants heard in Thurston County. In fact, superior courts will likely defer to the decision wherein Pierce County's transfer of venue to Thurston County was ruled proper. Op. 12.

2. The Commission May Not Assign Its Own Meaning To Unambiguous, Undefined Terms

The Gambling Commission, like other state agencies, is subject to the rules of statutory interpretation. *TLR, Inc. v. Town of La Center*, 68 Wn.App. 29, 841 P.2d 1276 (1992). Undefined terms are given their ordinary meaning. Ordinary meaning is properly ascertained by reference to the dictionary definition. *Id.* "Cash," as defined in the dictionary, includes cash equivalents. Checks are specifically referenced. Op. 16. Cash is ready money or its equivalent paid immediately or promptly after purchasing. Op. 16.

Just because the superior court and the Court of Appeals have both rejected the agency's position does not mean the judiciary has shifted the burden of proof. The Commission's "burden-shifting" argument equates to the Gambling Commission expecting absolute authority to assign whatever meaning it chooses to undefined terms in a quasi judicial hearing. No agency has such power. Isolated agency interpretations that defy common sense are unenforceable. *Cowiche Canyon Conservancy v.*

Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992). An agency may not bootstrap legal argument into the place of agency interpretation. *Id.*

The Court of Appeals, like the superior court, applied basic rules of statutory interpretation. Op. 16. The plain meaning of the term “cash” includes cash equivalents such as cash cards. The Commission argues a cash equivalent must be universally accepted. Op. 17. The Court of Appeals agrees and points out that a cash card is universally accepted. Just like a check, voucher, or chip, the cash card may be exchanged at the counter for money. The Court of Appeals was exceptionally deferential to the Commission. It simply did not agree that substantial evidence exists to treat a cash card as anything other than cash. This conclusion makes sense and is consistent with industry and business practices where cash cards are accepted as cash. It is not as if the Commission prohibits cash cards. Just the opposite, the Commission has approved ZDI’s “faux” slot machine with the cash card. Gerow Dec. Opposing Motion to Stay, Ex. B, Case No. 36751-3-II. ZDI just had to turn off the part of the cash card feature that records low tier prizes. *Id.* Nonsensically, customers are forced to take their cash card to the counter to add their pull-tab prizes onto their cash card.

The Court of Appeals recognized the expertise of the Gambling Commission, while acknowledging substantial evidence does not exist to support its conclusion. Substantial evidence must support agency action. RCW 35.05.570. In this case it did not.

3. The Commission's Power To Strictly Regulate And Control Gambling Remains Intact

Years ago, the Legislature decided to regulate, rather than to prohibit, gambling. RCW 9.46. The State Lottery and the Gambling Commission embraced gambling as a legitimate enterprise. RCW 9.46.010. Gambling may not be properly characterized as a "social and economic evil." The case law cited for the Commission's proposition predates the Gambling Act.

Substantial public interest is non-existent here because the paper pull-tab industry has a limited market. CP 1026, AR 786-788. The "faux" slot machines in non-tribal venues have far surpassed ZDI's technology because the tickets are electronic. AR 714. ZDI has to use paper tickets. Op. 4. ZDI's upgrade presents no threat of expanding gambling beyond what the Commission has already approved, and it has already approved ZDI's equipment. ZDI use of cash cards will not change the fact that pull tabs are a favored social pastime authorized by the Legislature to fulfill two important policy objectives: (1) to stimulate restaurant and tavern sales, and (2) to support charities and non-profits. RCW 9.46.010, 9.46.0325, and 9.46.0209, Op. 3.

4. ZDI Is Entitled To Its Attorney Fees

The Court of Appeals rejected ZDI's request for an award of attorney's fees on appeal because ZDI did not skip a line and separate its request for attorney's fees on appeal from its request for increased

attorney's fees at the trial court level in its opening brief. Op. at 26 and Order on Motion for Reconsideration at 1 ("In its opening brief, ZDI only made two passing references to attorney fees on appeal. First, it stated as an issue on review, "Should ZDI recover in full attorney's fees and costs under the Equal Access to Justice Act and on appeal?" Next, in its argument section titled "ZDI's Fee Award Was Unfairly Limited by the Unconstitutional Legislative Caps," which argues that the trial court erred in calculating its attorney fees below, ZDI concluded, "A full award under the Act is further justified by the fees expended on appeal." Thus, ZDI did not devote a separate section of its brief on the issue of attorney fees on appeal. Instead, it only briefly mentions appellate attorney fees in the last line of its argument that the trial court miscalculated its attorney fees below.")

ZDI asks this Court to reverse the Court of Appeals' denial of its request for appellate fees and to award ZDI its further reasonable attorney fees and costs on appeal under the Equal Access to Justice Act (EAJA). RCW 4.84.350. ZDI request fees for both levels of appellate review.

An award of attorney fees under the EAJA is not discretionary; "a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses..." The statute requires an award to the prevailing party of fees and costs up to \$25,000.00 for each level of review. *Costanich v. State of WA, Dep't of Social and Health Services*,

164 Wn. 2d 925, 194 P.3d 988 (2008). The statute entitles ZDI to fees. *State v. Nolan*, 98 Wn.App. 75, 988 P.2d 473 (1999).

ZDI asked for attorney fees on appeal in the body of its brief, “a full award under the Act is further justified by the fees expended on appeal.” ZDI Opening Brief at 50. The rule does not require separate paragraphs. ZDI further briefed its request for fees in its reply brief on the cross appeal because the Supreme Court accepted review of the *Costanich* case. By the time of oral argument, the *Costanich* case had been decided, allowing up to \$25,000.00 for each level of judicial review. ZDI requested the court apply the *Costanich* ruling and award ZDI costs on the appeal up to \$25,000.00 in its reply and at oral argument.

The Court of Appeals application of its rule to require a separate paragraph on appellate fees from trial fees when the same grounds for fees apply to each level prejudices ZDI. The Commission does not suffer any prejudice because the grounds for fees and costs are the same at each level and the Commission had the opportunity to be heard on the fees issue. The Commission responded to ZDI’s request for fees in its briefing.

ZDI has incurred substantial expenses in securing the vindication of its rights. Others may be deterred from seeking review or defending against unreasonable agency action in contradiction to the policy objectives of the EAJA if the decision on fees is not reversed.

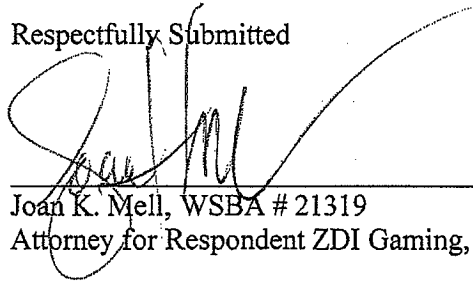
Should this matter continue on with judicial review, ZDI should recover the small portion of its overall expenses available under the Act.

F. CONCLUSION

Valid grounds for review under RAP 13.4(b) do not exist in this case. The Court of Appeals correctly resolved the issues before it in accordance with the jurisdictional requirements of the Gambling Act and basic principles of statutory interpretation. This Court should deny the Commission's Petition and should award reasonable attorney's fees and expenses to ZDI.

Dated this 9th day of November, 2009

Respectfully Submitted

A handwritten signature in dark ink, appearing to read 'Joan K. Mell', is written over a horizontal line. The signature is stylized with a large initial 'J' and a long, sweeping flourish extending to the right.

Joan K. Mell, WSBA # 21319
Attorney for Respondent ZDI Gaming, Inc.

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Jerry A. Ackerman, WSBA 6535
Assistant Attorney General
P.O Box 40100
Olympia, WA 98504-0100

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Date this 9th Day of November, 2009 at Fircrest, Washington.


Jonathan Tretheway
Paralegal

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Dear Clerk of the Supreme Court,

Attached please find the Answer to Petition for Review in the matter of ZDI Gaming, Inc. v. State of Washington, case No. 83745-7. This is being filed on behalf of ZDI Gaming, Inc. by its attorney of record Joan K. Mell, WSBA # 21319, e-mail joan@3brancheslaw.com. Please see below signature line for further contact information.

Sincerely,

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